

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA08-477

LEGACY DEVELOPMENT OF
NORTHWEST ARKANSAS, LLC,
APPELLANT

V.

MICHAEL S. KINNE and KARI E.
KINNE,

APPELLEES

Opinion Delivered NOVEMBER 5, 2008

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT,
[NO. CV-07-1721-2]

HONORABLE KIM M. SMITH,
JUDGE

AFFIRMED

KAREN R. BAKER, Judge

This appeal arises from a dispute over a fourteen-foot strip of property. The Kinnes alleged that they owned the property by virtue of adverse possession. Legacy Development responded that the Kinnes did not possess the disputed property for the requisite seven years and that Legacy's acts of ownership interrupted the Kinnes' period of adverse possession. The trial court issued a letter opinion quieting title in the Kinnes, finding that they had proved adverse possession of the disputed fourteen-foot strip of property. Legacy appealed the trial court's later order containing these findings. On appeal, Legacy presents two arguments. First, Legacy argues that the trial court erred in tacking on the possession period of the Kinnes' predecessor in title to satisfy the seven-year adverse possession period. Second, Legacy asserts that the trial court erred in failing to find that Legacy interrupted the period of adverse possession with unequivocal acts of ownership. We affirm.

On or around July 24, 1998, Southwind VI, LLC, purchased real property for the purpose of developing Phase VI of Southwind Terrace Subdivision in Springdale, Arkansas. At the time of

purchase, Southwind VI, LLC conducted a survey of the real property. The Southwind VI Final Plat was filed for record with the Circuit Clerk of Washington County, Arkansas, on December 31, 1998. Southwind Terrace Phase VI contained over thirty-five lots. The lot in dispute is Lot 173 of the Southwind Terrace, Phase VI, specifically, a fourteen-foot strip of land running north and south, along the east boundary of Lot 173 that is adjacent to Lot 16 of the Heritage Hills Subdivision.

On March 12, 1999, Southwind VI, LLC conveyed Lot 173 to R & S Custom Homes, Inc. R & S Custom Homes built a residence and made other improvements on Lot 173. However, Sonny Dudley, owner of R & S Custom Homes, stated that no improvements were made on the disputed fourteen-foot strip of land. On September 10, 1999, R & S Custom Homes, Inc., sold the residence and improvements on Lot 173 to Nick and Debra Tyler by warranty deed. The Tylers made several improvements on Lot 173, one of which included purchasing and placing a storage shed on the disputed fourteen-foot strip of property. On November 8, 1999, the Tylers also hired a contractor to build two wooden fences along the north and south boundaries of Lot 173. Both fences crossed the disputed fourteen-foot strip of land and connected to a barbed wire fence, which ran east and west along the east boundary of Lot 173. Also during their ownership of the property, the Tylers placed a child's swing set on the disputed fourteen-foot strip of land.

On November 6, 2003, the Tylers sold the residence and improvements on Lot 173 to appellees Michael and Kari Kinne by warranty deed. During negotiations, the Tylers and the Kinnes discussed the location of the east boundary line, and the Tylers told the Kinnes that the barbed wire fence was the east boundary line. A survey was not conducted when Lot 173 was sold to the Kinnes.

On August 19, 2004, appellant Legacy had Lot 16 of the Heritage Hills Subdivision surveyed for purposes of purchasing Lot 16 from the Dorcas Curtis Revocable Trust and for developing a

subdivision. Legacy's survey revealed that the east boundary of Lot 173 was fourteen feet west from the barbed wire fence, which was in agreement with the 1998 Southwind VI Final Plat survey line on the east boundary. According to the 2004 survey, the barbed wire fence was located approximately fourteen feet east of the original survey line, and the swing set, storage shed, and a portion of the fences were located across and to the east of the original survey line.

On September 14, October 11, and November 15, 2004, Jennifer Allen, Recorder/Treasurer for the City of Johnson, Arkansas, sent notification to the lot owners of Phase VI of Southwind Terrace advising the lot owners that a Public Hearing on a Large Scale Development on thirty-eight acres west of Carley Road, Johnson, Arkansas, for a residential subdivision, which was scheduled to be held October 25, 2004. The notice was mailed to the Kinnes. The Kinnes deny receiving the notice and did not attend the public hearings.

On March 1, 2005, Legacy purchased Lot 16 from the Curtis Trust and began developing the Heritage Hills Subdivision. On May 9, 2006, Garth Hill, president of Legacy, visited with the Kinnes in their home on Lot 173 and advised them that they were trespassing on fourteen feet of Lot 16. Hill showed the Kinnes a copy of the August 2004 Legacy survey. The next day, Hill and David Hadlock, a surveyor with McClelland Engineering, visited with Michael Kinne, showed him the August 2004 Legacy survey and the 1998 Southwind VI Final Plat, and showed him the corner pins on Lot 173 per the 1998 Southwinds VI Final Plat.

It was not until May 9, 2006, when Hill visited with the Kinnes, that they had any knowledge that the east boundary of Lot 173 did not extend to the barbed wire fence. Then on May 26, 2006, Legacy's attorney sent a letter to the Kinnes advising them that they were using and encroaching on property owned by Legacy and requested that the Kinnes remove "any items that lie on or, are

located within, Heritage Hills Subdivision prior to June 7.” The Kinnes did not remove the swing set, storage shed, or the fencing, and Legacy did not take any further action.

On July 11, 2007, the Kinnes filed this lawsuit alleging that they were entitled to ownership by adverse possession of the fourteen-foot strip of property that lies between Lot 173 and the barbed wire fence line. Legacy filed an answer and a counter claim on July 20, 2007, denying the adverse possession claim, requesting that the court order the Kinnes to be removed from the property, and seeking damages for trespass. The Kinnes published notice of the quiet title action with the Washington County Circuit Clerk as required by Arkansas law. The Kinnes and their predecessors have paid property taxes on Lot 173 and the improvements thereon since September 10, 1999.

In lieu of a hearing, the parties entered into a set of written Stipulation of Facts and submitted briefs in support of their respective positions. In a letter opinion dated February 20, 2008, the trial judge granted the Kinnes’ petition to quiet title, finding the Kinnes had proved that they were entitled to record title of the extended area based on adverse possession. Legacy’s counter-claim was dismissed. The trial court entered an order to this effect. Legacy’s notice of appeal followed.

The appellate review of an equity matter requires the appellate court to review the cases de novo on the record, and we do not reverse unless we determine that the trial court’s findings of fact were clearly erroneous. *Holaday v. Fraker*, 323 Ark. 522, 920 S.W.2d 4 (1996). A finding of fact is clearly erroneous when, although there is evidence to support it, the appellate court is left with the definite and firm conviction that a mistake has been committed. *Id.* Discrepancies in the evidence are matters involving credibility for the trier of fact to resolve. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004).

Adverse possession is governed by both common and statutory law. To prove the common-law elements of adverse possession, a claimant must show that he has been in possession of the property continuously for more than seven years and that his possession has been visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005). It is ordinarily sufficient proof of adverse possession that the claimant's acts of ownership are of such a nature as one would exercise over his own property and would not exercise over the land of another. *Id.* For possession to be adverse, it is necessary that it be hostile only in the sense that it is under a claim of right, title, or ownership as distinguished from possession in conformity with, recognition of, or subservience to, the superior right of the holder of title to the land. *Fulkerson v. Van Buren*, 60 Ark. App. 257, 961 S.W.2d 780 (1998). There is every presumption that possession of land is in subordination to the holder of the legal title. *Id.* The intention to hold adversely must be clear, distinct, and unequivocal. *Id.*

Legacy's first argument on appeal is that the trial court erred in tacking on the possession period of the Kinnes' predecessor in title to satisfy the seven-year adverse possession period because the Tylers (the predecessors in interest) did not have a "hostile motive," thereby not satisfying the requirements for adverse possession. In *Dickson v. Young*, 79 Ark. App. 241, 243-44, 85 S.W.3d 924, 925-26 (2002), this court stated:

The law of adverse possession, and specifically the intent required, has often been misinterpreted and misapplied. The question of intent becomes one of nuance in many cases, with hair-splitting terminology deciding the fate of the possessor's claim. This holds especially true in cases of mistaken boundary. Our supreme court, in 1894, speaking to adverse possession, stated that:

There must be an intention to claim title. If one of two adjacent owners inclose or build upon his neighbor's land "through mere inadvertence, or ignorance of the

location of the real line, or for purposes of convenience, and with no intention to claim such extended area, but intending to claim adversely only to the real or true boundary line, wherever it might be, such possession would not be adverse or hostile to the true owner.” But it would be if he inclosed, or built upon and held, the land under the belief and claim that it was his own, even though the claim of title was the result of a mistake as to the boundaries of his own land. In such a case, there is a clear intention to claim the land occupied or inclosed, and the possession does not originate in an admitted possibility of mistake.

Wilson v. Hunter, 59 Ark. 626, 628, 28 S.W. 419, 419 (1894) (citation omitted).

When a landowner, through mistake as to his boundary line, takes possession of land of an adjacent owner, intending to claim only to the true boundary, such possession is not adverse, and, though continued for the statutory period, does not divest title; but when he takes possession of the land under the belief that he owns it, incloses it, and holds it continuously for the statutory period under claim of ownership, without recognition of the possible right of another on account of mistake, such possession is adverse. *Davis v. Wright*, 220 Ark. 743, 249 S.W.2d 979 (1952); *Butler v. Hines*, 101 Ark. 409, 142 S.W. 509 (1912). If the intention is to hold adversely, the statute runs, regardless of any mistake as to boundary or title. *Bayles v. Daugherty*, 77 Ark. 201, 91 S.W. 304 (1905).

The supreme court later noted, however, that “an honest claimant upon being asked about his intent, unless previously warned, might not think to qualify his answer so as to claim what he considered his own, but would state that he claimed only his own, and on such a chance statement his claim would disappear.” *Rye v. Baumann*, 231 Ark. 278, 281, 329 S.W.2d 161, 164 (1959). The court concluded that “in arriving at the intent of the disseisor we think it is better to weigh the reasonable import of his conduct in the years preceding the litigation rather than rely on one remark made during the stress of cross-examination (which is elsewhere refuted).” *Id.* This rationale is in accord with the “oft-repeated statement that adverse possession is a possession commenced in wrong but maintained in right,” as such statement “does not mean that the possessor must commence his possession with an intentional wrong, for the doctrine of adverse possession is intended to protect one who honestly enters into possession of land in the belief that the land is his own.” *Barclay v. Tussey*, 259 Ark. 238, 241, 532 S.W.2d 193, 195 (1976).

In the case before us, it is clear that the actions of both the Tylers and the Kinnes satisfied the requisite elements of adverse possession, including the elements of hostile possession and the intent to hold against the true owner. The Tylers purchased Lot 173 on September 10, 1999, and

within two months of the purchase, the Tylers had a fence constructed that crossed over the disputed fourteen-foot strip of land and had a storage building placed on it. Also, at some point during the Tylers' ownership of the property, a swing set was placed on the disputed fourteen-foot strip of land. After the Tylers sold Lot 173 to the Kinnes, the Kinnes did not remove the fencing, storage shed, or swing set. Whether possession is adverse to the true owner is a question of fact. *Fulkerson v. Van Buren*, 60 Ark. App. 257, 961 S.W.2d 780 (1998). This court has held that a claimant may "tack on" the adverse-possession time of an immediate predecessor in title. *White River Levee Dist. v. Reidhar*, 76 Ark. App. 225, 61 S.W.3d 235 (2001). We affirm this point.

Legacy's second argument on appeal is that the trial court erred in failing to find that Legacy interrupted the period of adverse possession with unequivocal acts of ownership. Legacy contends that it exhibited the following acts of ownership to the fourteen-foot strip of land: a survey conducted on Lot 16 before Legacy purchased the property from the Curtis Trust; three notices of a public hearing sent out by the City of Johnson to the owners of Southwind Terrace, Phase IV; a visit to the Kinnes to discuss the issue of the boundary line; and a letter from Legacy's attorney to the Kinnes advising them that they were trespassing on Legacy's property and requesting removal of the personal property from the fourteen-foot strip of land.

To stop the running of the statute of limitations, there must be a physical interruption of adverse possession, or a suit, or some unequivocal act of ownership which interrupts the exercise of the right claimed and being enjoyed by the adverse claimant. *Ottis v. Certain Lands*, 251 Ark. 299, 472 S.W.2d 104 (1971). Here, there is no evidence that Legacy conducted any act that physically interrupted the Kinnes' adverse possession of the disputed property. There was also no evidence that a lawsuit was filed by Legacy. Nor did the evidence show that Legacy committed any other

unequivocal act that interrupted the Kinnes' claim of adverse possession. While Legacy claims that the survey was an unequivocal act of ownership, most authorities recognize that a survey, in and of itself, does not always toll the limitations period.¹ See 3 AM. JUR. 2D *Adverse Possession* § 107 (2d ed. 2002); 2 C.J.S. *Adverse Possession* § 173 (1972). The Kinnes and the Tylers were in possession of the disputed property and enjoyed the use of the disputed property continuously for more than seven years, and their possession was visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. Under the facts of this case, we cannot say that the trial court's finding of adverse possession was clearly erroneous.

Affirmed.

BIRD and MARSHALL, JJ., agree.

¹Legacy fails to cite any supporting authority to this court that the survey was an unequivocal act of ownership.